

1 INDEX OF PROCEEDINGS

2  
3 April 21, 1999  
4 (Morning Session)  
5  
6  
7

8 WITNESS: PAGE  
9 RICHARD ALLAN CARCHMAN, Ph.D.  
10  
11 CROSS-EXAMINATION (Cont'd.)  
12 BY MR. WILNER..... 7853  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

8009

1  
2 E X H I B I T S  
3  
4

5 EXHIBIT NUMBER PAGE  
6  
7 Exhibit Number 387 was marked for  
8 identification and admitted into evidence..... 7859  
9 Exhibit Number 388 was marked for  
10 identification and admitted into evidence..... 7869  
11 Exhibit Number 389 was marked for  
12 identification and admitted into evidence..... 7872  
13 Exhibit Number 390 was marked for  
14 identification and admitted into evidence..... 7893  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

7931

1 IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE  
2 FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

---

3 BOBBY NEWCOMB,  
4  
5 Plaintiff,

T.D.

6  
7 R.J. REYNOLDS TOBACCO COMPANY, and  
8 THE BROWN AND WILLIAMSON TOBACCO  
9 COMPANY, as successor by merger to  
10 THE AMERICAN TOBACCO COMPANY,  
11  
12 Defendants.

---

11  
12  
13 Before: The Honorable D'Army Bailey  
14

15  
16 TRANSCRIPT OF PROCEEDINGS

17  
18 April 21, 1999  
19 (Morning Session)  
20

21  
22 Volume 50  
23

24 ALPHA REPORTING CORPORATION  
25 (901) 523-8974  
SOUTHERN REGISTERED REPORTERS  
(901) 526-2179

7932

1

---

2 EDITH KARNEY, Individually, and  
3 On behalf of the Estate of  
4 JAMES WILEY KARNEY,  
5 Plaintiffs,

- vs -

Case No. 89196-8

T.D.

6  
7 PHILIP MORRIS, INC., and  
8 PHILIP MORRIS COMPANIES, INC.,  
9 Defendants.

---

9  
10 RUBY SETTLE, Individually, and  
11 On behalf of the Estate of  
12 RAYMOND SETTLE,  
13 Plaintiffs,

- vs -

Case No. 89226-8

T.D.

13  
14 B.A.T. INDUSTRIES, PLC; BATUS HOLDINGS,  
15 INC.; BROWN & WILLIAMSON TOBACCO  
16 CORPORATION; BRITISH AMERICAN TOBACCO  
17 COMPANY, L.T.D.,  
18  
19 Defendants.

T.D.

18 DENISE McDANIEL, Individually,  
19 and On behalf of the Estate of  
20 FLORENCE BRUCH,  
21 Plaintiff,  
- vs - Case No. 90832-8  
22  
23 BROWN AND WILLIAMSON TOBACCO  
24 CORPORATION, and  
25 PHILIP MORRIS, INC.,  
Defendants.

7933

1 A P P E A R A N C E S  
2  
3 FOR THE PLAINTIFFS:  
4 Curtis D. Johnson, Jr., Esq.  
JOHNSON & SETTLE  
5 67 Madison Avenue  
Suite 201  
6 Memphis, TN 38103  
7 Florence M. Johnson, Esq.  
AGEE, ALLEN, GODWIN, MORRIS  
8 LAURENZI & HAMILTON  
200 Jefferson Avenue  
9 Suite 1400  
Memphis, TN 38103  
10  
11 Norwood S. Wilner, Esq.  
SPOHRER, WILNER, MAXWELL  
MACIEJEWSKI & STANFORD, PA  
12 444 East Duval Street  
Jacksonville, FL 32202  
13  
14 FOR THE DEFENDANT  
R.J. REYNOLDS:  
15 Albert C. Harvey, Esq.  
THOMASON, HENDRIX, HARVEY,  
16 JOHNSON & MITCHELL, PLLC  
2900 One Commerce Square  
17 Memphis, TN 38103  
18 Gregory R. Hanthorn, Esq.  
James R. Johnson, Esq.  
19 JONES, DAY, REAVIS & POGUE  
3500 One Peachtree Center  
20 303 Peachtree Street  
Atlanta, GA 30308-3242  
21  
22  
23  
24  
25

7934

1 FOR THE DEFENDANT  
PHILIP MORRIS:  
2 Samuel E. Klein, Esq.  
DECHERT PRICE & RHOADS  
4000 Bell Atlantic Tower  
3 1717 Arch Street  
Philadelphia, PA 19103-2793  
4  
David K. Hardy, Esq.

5 SHOOK, HARDY & BACON  
1200 Main Street  
6 Kansas City, MO 64104  
7 Leo Bearman, Jr., Esq.  
BAKER, DONALSON, BEARMAN  
8 & CALDWELL  
165 Madison Avenue  
9 Suite 2000  
Memphis, TN 38103

10

FOR THE DEFENDANT  
BROWN AND WILLIAMSON:

11  
12 Lee J. Chase, III, Esq.  
GLANKLER BROWN, PLLC  
13 1700 One Commerce Square  
Memphis, TN 38103

14

Charles S. Cassis, Esq.  
15 BROWN, TODD & HEYBURN, PLLC  
400 West Market Street  
16 32nd Floor  
Louisville, KY 40202-3363

17

Gordon Smith, Esq.  
18 KING & SPALDING  
191 Peachtree Street  
19 Atlanta, GA 30303-17631  
20 COURT REPORTERS: LORI-ANN MASON, RPR  
Southern Registered Reporters

21

22

23

24

25

7935

1 (At 10:35 a.m., on the 21st day of  
2 April, 1999, Court met, pursuant to adjournment,  
3 when and where the following proceedings occurred,  
4 to wit:)

5 (Out of the presence of the jury.)

6 THE COURT: All right. Mr. Hardy, I see  
7 you're on your feet.

8 MR. HARDY: Yes, Your Honor. I had  
9 several matters I wanted to mention, and I'll deal  
10 with them as fast as I can.

11 To start off on an unhappy note, I  
12 just -- I want to make a record about something  
13 that happened yesterday. I'm not asking the Court  
14 for any relief. But I think I need to make a  
15 record on this. When Exhibit 382 was offered into  
16 evidence, there was a bench conference at which it  
17 was agreed and ruled that part three on pages 2

and

18 3 would be deleted. Those were redacted. Those  
19 were pages pertaining to lobbying Congress and  
20 legislation. And I had raised the objection based  
21 on Noerr-Pennington.

22 When Counsel began showing the exhibit  
23 and discussing it with the witness in front of  
24 jury, he first told the jury or said in front of  
25 the jury that I had wanted Congressional

7936

1 legislative material taken out of the document and

2 then about 30 seconds later again referred to the  
3 Congress reference being deleted at my request.  
4 And I think that's improper.  
5 THE COURT: I recall that, and I agree  
6 with you. I thought that those comments were  
7 inappropriate. I don't think -- I suspect they  
8 were harmless in the context of the jury making  
any  
9 meaning out of them, since there hasn't been any  
10 discussion in the presence of the jury as to  
11 lobbying or Noerr-Pennington. And I don't see how  
12 the jury can interpret it with any substantive  
13 content as it relates to the lobbying element.  
14 Actually there has been some reference  
in  
15 some of the defense proof, although not much, but  
16 some as to testimony before Congressional  
17 Committee, which is to say that I -- I don't know  
18 that the jury can make much of that one way or the  
19 other. But I tend to agree with you.  
20 But we didn't hear from Mr. Wilner. But  
21 I did hear your comments, and I follow what you  
22 said.  
23 MR. WILNER: Your Honor, if I said  
24 anything improper, I apologize. It was not my  
25 intent. I did not intend and I don't remember  
7937  
1 saying any particular person removed it. I was  
2 trying to be scrupulously fair when I represented  
3 to the Court what we were doing because we had  
4 document which we had taken some parts out. It  
5 wasn't clear what we were doing. I was trying to  
6 be as neutral as possible and not trying to blame  
7 him. That's what I was trying to do. If that  
came  
8 across wrong, my apologies. It won't happen  
again.  
9 THE COURT: I didn't interpret it to be  
10 specific to any one lawyer or any one defense, but  
11 the transcript speaks for itself in that regard.  
12 MR. HARDY: I won't belabor it.  
13 Second point, counsel did meet  
yesterday,  
14 Mr. Wilner and I, immediately after court, as the  
15 Court had instructed. We did discuss documents.  
16 Plaintiffs Counsel provided us promptly with  
17 information yesterday evening about which  
documents  
18 they intended to use. Initially that was a list  
of  
19 some 47 documents beyond what had already been  
gone  
20 into yesterday.  
21 Mr. Wilner and I further discussed this  
22 this morning for about a half an hour, and I  
23 understand the number is pared down substantially  
24 from that. And I had informed him which of the  
25 documents he intends to use I intend to object to  
7938  
1 and why so that when and if he presents a  
2 particular document to the witness I will know  
3 immediately if I have an objection and what it is.  
4 It will require, I think, in each instance

5 approaching the bench. I don't know how  
6 much -- how time consuming that will be because I  
7 don't really know how many he intends to offer.  
8 It is my understanding or at least it is  
9 my hope that we can finish Dr. Carchman today, so  
10 he doesn't have to come back next week. And  
11 Mr. Wilner has advised that he intends to try to

do  
12 that.

13 With that being said, I'll go on to the  
14 next topic, unless you want to add something?

15 MR. WILNER: Only that I intend -- I'm  
16 planning to finish before lunch, but depending on  
17 when we start. That may not happen. But that's  
18 what I hope to do.

19 MR. HARDY: All right. That brings me  
20 to --

21 THE COURT: Well, I'll just say this  
22 about the documents: As we have done -- As has  
23 been my inclination at this stage, I'm not

inclined  
24 to take a lot of time trying to rack my brain to  
25 figure out some evidentiary basis that doesn't

just

7939

1 leap out at me with regard to some of these

things,  
2 particularly inasmuch as the submissions are in  
3 some respects in the nontraditional manner.

4 I've attempted to be liberal and

tolerant  
5 with regard to trying to allow the broadest scope  
6 of proof to be presented. But I do not see that  
7 we're going to bog down today in argument over  
8 these documents.

9 MR. HARDY: And the next point,  
10 Your Honor, our last witness will be Dr. Seiden, a  
11 psychiatrist. We had intended to bring Dr. Seiden  
12 in yesterday so that he could testify today when  
13 and if Dr. Carchman was completed, with time  
14 remaining in the day. We learned, however, that  
15 Dr. Seiden is under a federal court subpoena to  
16 testify in a federal court case unrelated to  
17 tobacco, in Shreveport, Louisiana, and is  
18 testifying as we speak. Therefore, it is not  
19 possible for us to produce the witness today, if  
20 there should be any remaining court time today.

So  
21 I wanted to advise the Court of that because we  
22 have ourselves in a position where we can't put

our  
23 last witness on, since there's no court tomorrow,  
24 until first thing Monday morning.

25 THE COURT: That will be fine. Anything  
7940

1 else?

2 MR. HARDY: A couple things just  
3 briefly. As Your Honor knows, there's a 48-hour  
4 witness and exhibit or document list. And I just  
5 want to be sure on the record that it's understood  
6 that that applies to rebuttal witnesses and that

if  
7 plaintiff intends to seek leave to call a rebuttal

8 witness next week, we would -- we would like to  
9 have as much notice as possible. I think 5:00  
10 o'clock Friday would be their deadline. If we can  
11 learn of that earlier, it would help, because I  
12 believe there's a significant chance that the  
13 defendants would want to raise a question as to  
14 whether it was a proper rebuttal witness. So we  
15 would like as much notice as we could get in order  
16 to deal with that.

17 Finally --

18 MR. WILNER: Excuse me, Your Honor.

19 MR. HARDY: Yes.

20 MR. WILNER: Agreed, with one humble  
21 exception; and, that is, if there's a rebuttal to  
22 the witness who has not even testified yet, the  
23 doctor who's coming Monday -- We don't know in  
24 advance whether we might need a rebuttal to that  
25 witness because the witness hasn't testified yet.

7941

1 With the exception of that, then, we agree should  
2 we intend to call a witness to rebut any of the  
3 matters that have been presented, we would need to  
4 disclose -- we would fully intend to disclose  
5 that --

6 THE COURT: I understand.

7 MR. WILNER: -- at the proper time.

8 THE COURT: Well, that sounds reasonable  
9 to me. Mr. Hardy, what do you say?

10 MR. HARDY: It sounds reasonable to me.

11 THE COURT: All right.

12 MR. HARDY: At some point today -- and I  
13 don't suggest that this is the time, but perhaps  
14 when the Court's getting ready to send the jury  
15 home at the end of the day, if there's something  
16 the Court could say about the progress of the  
17 trial, we would appreciate it.

18 It is our concern that because of the  
19 fact that the representation was made to them  
20 earlier that we were going to finish in two weeks  
21 and we haven't quite made that, under the  
22 circumstances I'm just concerned that they'll

think

23 for some reason that the defendants are

responsible

24 for the additional time.

25 I don't have any particular statement in

7942

1 mind. I would just like for the Court to consider  
2 the possibility of something along those lines.

3 And then, finally, Mr. Wilner and I also  
4 talked this morning about a prospective schedule  
5 for the end of -- the conclusion of the trial.

And

6 I think -- And then I spoke with cocounsel for the  
7 defendants, and I think we arrived at at least an  
8 idea of a scenario that I would just mention  
9 briefly to the Court for your consideration. And  
10 that is that assuming Dr. Carchman is off the

stand

11 and Dr. Seiden is concluded on Monday, and with or  
12 without a short rebuttal by --

13 THE COURT: I'm sorry. Just a minute.

14 Who's your next witness? Doctor -- Give me his

15 name again.  
16 MR. HARDY: Seiden, S-e-i-d-e-n.  
17 THE COURT: And what is his area of  
18 expertise?  
19 MR. HARDY: Psychiatrist.  
20 THE COURT: All right. And that will be  
21 Monday presumably?  
22 MR. HARDY: Yes, Your Honor.  
23 THE COURT: All right. And is he your  
24 last witness?  
25 MR. HARDY: Yes, Your Honor.

7943

1 THE COURT: All right.  
2 MR. HARDY: So apart from anything we  
3 might want to offer by way of judicial notice, I'm  
4 not sure at this point there will be anything.

But

5 it would be a matter of a few minutes if there  
6 was. We would be resting then.

7 THE COURT: All right. Okay.

8 MR. HARDY: Our suggestion then was  
9 whatever was left of Tuesday and Wednesday be  
10 utilized for motions and jury instructions, which  
11 in view of the three cases I think will be rather  
12 lengthy -- the jury instructions, that is. And  
13 that the closing arguments occur on Monday, May  
14 3rd, and Tuesday, May 4th, at a length equal to  
15 that of opening statements which was three hours  
16 per side.

17 THE COURT: All right. But, now, before  
18 we get that far, let me just understand, now,

after

19 you presented Dr. Seiden, Mr. Wilner, do you know  
20 now or do you feel prepared to let us know what  
21 number of rebuttal witnesses you would be prepared  
22 and propose to present next week? Obviously not  
23 talking about Dr. Seiden.

24 MR. HARDY: Your Honor, at this point we  
25 do not have the plans to call rebuttal on what has

7944

1 been said so far in trial, except at least by way  
2 of a witness, we do have some document  
3 housekeeping. We do have some documents that we  
4 had marked for identification that we will be  
5 moving in. We have probably a few documents in  
6 rebuttal that we'll offer. But right now it is

our

7 present position, subject to change, but present  
8 good faith position that we do not have a rebuttal  
9 witness at this time.

10 THE COURT: All right. So then if by  
11 chance we were to finish on Monday or Tuesday, we  
12 could then excuse the jury so that we could cover  
13 motions, which I shouldn't think would take us

more

14 than half a day, if that long, as much as we've  
15 been arguing the law all the way down through the  
16 trial anyway. So then discussion of the charge

and

17 that will probably take, I would imagine, could  
18 take us up to a day anyway. And in that regard I  
19 would ask that you lawyers present me any special  
20 charges that you want by Monday morning at 10:00.

21 MR. HARDY: Yes. We'll be happy to do  
22 that.  
23 THE COURT: All right. Now, let me just  
24 tell you this: I tend to prefer to use the  
25 standard TPI charges generically, except as to  
7945  
1 matters that must be handled specially. And  
2 obviously there will be some items of law that  
will  
3 have to be specially crafted for the jury in this  
4 case.  
5 One of the things -- When did the  
6 Minnesota or these multidocuments become  
7 disclosed? Were they in the Minnesota trial?  
8 MR. HARDY: I'm not sure of the timing.  
9 MR. WILNER: Your Honor, there actually  
10 have been several disclosures, but one major one  
11 occurred as a result of the settlement of the  
12 Minnesota case where there was established a  
public  
13 depository which would, by order of the court, be  
14 open to all, and that the defendants were directed  
15 to put their materials in there.  
16 There was a subsequent and further  
17 disclosure that was signed as a result of the  
18 master settlement agreement with all the states,  
19 including Tennessee, which required that the  
20 defendants place the documents that they  
21 have -- have ever produced in any case into that  
22 repository and, further, to make them available to  
23 the public on the Internet.  
24 THE COURT: All right.  
25 MR. WILNER: And that occurred, I think,  
7946  
1 last -- pieces of that were put in within a month  
2 after the signing or two months after the signing  
3 of the master settlement agreement among the  
4 states. And the Internet sites have been -- Just  
5 as a technological issue, the Internet sites I  
know  
6 have been revised several times. And I think the  
7 latest revision happened within the past few  
8 months.  
9 And, Your Honor, not to belabor, and I  
10 don't really want to go -- I think we have  
11 together, Mr. Hardy and I, resolved all with but  
12 one or two authentication issues. So I don't mean  
13 to rehash this, and I won't, except we do have a  
14 pleading where we in Memphis requested documents  
15 and were referred to the Minnesota registry, which  
16 was, I think, the proper response and a good faith  
17 response and certainly nothing we would challenge,  
18 because that is where the documents have been  
19 deposited. And it would be improper for us to  
say,  
20 no, I want you to go and make more copies at our  
21 expense or your expense to copy what we already  
had  
22 or -- and was accessible. And that was my only  
23 point.  
24 Now, I think Counsel's point  
25 yesterday -- and I also take that in good

7947

1 faith -- was that they could not affirmatively  
2 state that that was produced into the Minnesota  
3 depository. And I was unable to produce proof  
that  
4 it was. In that situation I think that I have to  
5 produce proof, at least that they produced it as  
6 accordance with that -- with their agreement to do  
7 so. And so I'm not trying to reargue that.  
8 I would only say that if, in fact, they  
9 have produced it and I can prove it, as part of  
the  
10 court order, into a public depository, that may  
not  
11 be admissibility, but that should be at least the  
12 first step about that the paper didn't blow in  
from  
13 the street. But I don't think we'll really need  
to  
14 address that very much because I think Mr. Hardy  
15 and I have agreed on at least 95 percent of what  
16 we're going to talk about.  
17 MR. HARDY: Your Honor?  
18 THE COURT: Yes, sir.  
19 MR. HARDY: I assume Mr. Wilner's  
talking  
20 about a request for production or some sort of  
21 discovery in some other Memphis cases than these.  
22 MR. WILNER: Yes.  
23 MR. HARDY: And my point is -- And my  
24 point was yesterday that no request for  
25 production -- no request for admission, that the  
7948  
1 records were business records, authentic,  
2 foundation, nothing was asked in this case.  
3 And my whole point yesterday, apart from  
4 my lack of familiarity with the particular  
document  
5 we were talking about at the time, is that it's  
6 inappropriate and improper for the plaintiff to  
7 conduct no discovery and then just come in,  
8 basically say, "Well, all I have to do is say that  
9 this came from a certain location," and opposing  
10 counsel must then accept it as an officer of the  
11 court and either affirm or deny that to the Court.  
12 All he has to do is propound the interrogatories  
or  
13 the requests to us as part of the trial. And  
14 that's the proper thing to do. And that's how we  
15 got into that argument yesterday.  
16 THE COURT: Well, going back just for a  
17 minute to the charge, when did the Minnesota trial  
18 start?  
19 MR. WILNER: Started a  
20 year -- about -- Was it a year ago? Two years  
21 ago. It's ended.  
22 MR. HARDY: It started in late 97 or  
23 early 98.  
24 MR. WILNER: Right. January of 98, I  
25 think, when they started it. And they finished it  
7949  
1 in May of 98.  
2 THE COURT: Well, one of the things -- I  
3 guess the reason I'm asking that is one of the

4 things we'll need to address -- and I'm sure it  
5 will come up when we're dealing with motions  
6 pertinent to the statute of limitations that would  
7 also bear on the charge, and that will be as it  
8 relates to the claims of fraud and concealment and  
9 the notice element. No one should have known in  
10 terms of -- and how evidence is going to be framed  
11 according to the law. It may appertain too to the  
12 availability, it occurs to me, of these documents  
13 or the awareness of -- to the public of some of  
14 these documents and the information contained  
15 therein as they relate to the charges.

16 So I think that's something that we'll  
17 have to assess, I'm sure, when we're dealing with  
18 our motions.

19 Now, back to the issue about the  
20 documents, I guess we'll just have to see what  
21 comes up and what Mr. Wilner wants to introduce

and  
that

22 basics for it. And I understand your position  
23 the rules of foundation apply. And just a  
24 reference to something that's been introduced in  
25 other litigation is not going to be sufficient.

7950

1 MR. HARDY: That's correct, Your Honor.  
2 And I have told -- Mr. Wilner understands which  
3 ones I have a foundation objection to, which ones

I  
4 have a relevancy objection to and so forth.  
5 MR. WILNER: Yeah. I think we're only  
6 talking about three foundation out of maybe a set  
7 of 15 that we talked about. So I don't think that  
8 that's going to be a problem. If I can't lay the  
9 foundation, I won't offer the document.

10 THE COURT: All right.

11 MR. CURTIS JOHNSON: Your Honor, just a  
12 quick question. On the pattern jury instructions,  
13 is the Court using the third edition of the  
14 instructions or the second?

15 THE COURT: That's a good question. I  
16 tend to prefer some of the language in the second  
17 just because I think for a lay jury it's a little  
18 bit more ordinarily written. But that's just a  
19 matter of style. Obviously the law is of -- The  
20 third edition will be the law that will apply.

But

21 the matter in which it's stated I may prefer some  
22 of the language of the second. So -- I'll  
23 generally work from the second edition. But if  
24 there's some difference in the law and the third  
25 edition, then I'll incorporate the third edition

7951

1 charges as a part of the charge.

2 But, as I said, I do -- be mindful so we  
3 won't have to spend a lot of time on the charge  
4 that if I -- if it appears that the generic  
5 presentation of the TPI patterns will cover the  
6 issue of law sufficiently to the jury, then I tend  
7 to opt for that as opposed to getting into

specific

8 detail in the charge.

9 And so I guess then if we look at

Tuesday

10 and Wednesday for the discussion of the charges,  
11 that will leave us Thursday. And so the  
12 suggestion, Mr. Hardy, that we do the closings on  
13 Monday and Tuesday the following week, is that --  
14 MR. HARDY: Yes, Your Honor. May 3 and  
15 4th.

and

16 THE COURT: I think that makes sense,  
17 that keeps us from -- and it gives us some

latitude

18 to work with on any of those things that may take  
19 more time.

have

20 MR. HARDY: And one other final question  
21 in that regard, is it the Court's intention to

22 the jury deliberate on a Friday if -- if a Friday  
23 comes up and there has been no verdict at that  
24 point?

25 THE COURT: Yes.

7952

1 MR. HARDY: Thank you.

2 THE COURT: And I also might say this,

to

3 the maximum extent possible, I am probably

inclined

4 to use a general rather than an interrogatory  
5 verdict form, so you may also be mindful of that.

6 All right. Are you all ready for the  
7 jury?

8 MR. WILNER: Yes, Your Honor.

9 MR. HARDY: Yes, Your Honor.

10 THE COURT: All right.

11 MR. HARDY: Your Honor, should we bring  
12 in the witness?

13 THE COURT: Yes, please.

14 You all remain seated.

15 (Whereupon, a brief recess ensued.)

16 (Whereupon, the jury was seated in the  
17 jury box.)

18 THE COURT: Remain seated.

19 Good morning, ladies and gentlemen.

20 THE JURORS: Good morning.

21 THE COURT: Thank you for being back in

a

22 timely manner, and we are ready to continue. And  
23 when we finished yesterday, Mr. Wilner was in the  
24 middle of his cross-examination of Dr. Carchner  
25 [sic].

7953

1 And, Mr. Wilner, you may continue.

2 Dr. Carchner, you're still under oath  
3 from yesterday.

4 MR. WILNER: Thank you, Your Honor.

5

6 RICHARD ALLAN CARCHMAN, Ph.D.,  
7 having been previously duly sworn by the Clerk to  
8 tell the truth, the whole truth and nothing but

the

9 truth, returned to the witness stand and testified  
10 as follows:

11 CROSS-EXAMINATION (Cont'd.)

12 BY MR. WILNER:

13 Q. Good morning, Doctor.  
14 A. Good morning, sir.  
15 Q. We'll try to move this along just as  
fast  
16 as we can and get you home.  
17 A. Thank you.  
18 Q. When we left yesterday we just put up  
19 Dr. Wakeham's document from 1969 where he had said  
20 we have got to -- And on the second page, We've  
got  
21 to begin testing our products. The conclusion is  
22 inescapable from all this -- is inescapable. We  
23 should start testing our products now because it  
24 will be two years before we know the answer. And  
25 that was in 1969. Remember that?

7954

1 A. Yes, sir.  
2 Q. And did you say why you thought  
3 Dr. Wakeham, who is head of the research and  
4 development department, then wanted to begin  
5 testing the products?  
6 A. By mouse skin painting?  
7 Q. By whatever was available at the time?  
8 A. This -- If I remember correctly, this  
9 particular memo was specifically referring to the  
10 mouse skin painting. And I think it seems evident  
11 here, since at that time it took about two years  
to  
12 do the assay, if you're going to use that assay  
you  
13 needed to start testing whatever -- whatever it is  
14 you want right now, because it's going to take two  
15 years to get the results using this particular  
16 assay.  
17 Q. I wasn't going after the two years. Why  
18 would you want to do it at all?  
19 A. I'm sorry. The purpose of what was  
going  
20 on with regard to cigarette design changes was to  
21 do testing. Here he's talking about a specific  
22 kind of test that he is talking about doing  
23 evaluations on right now because of the lead time  
24 assessed with it. He's not talking about not  
doing

7955

1 kind of test.  
2 Q. Well, let's stick to what we've got  
3 here. Why would he want to start doing tests?  
4 A. It's not a question of why would he want  
5 to start doing tests. Why would he want to start  
6 doing this particular test.  
7 Q. All right. Let's have it your way. Why  
8 would he want to start doing this particular test?  
9 A. Well, if we go back to the previous page  
10 of this memo, he goes through an explanation of  
11 why. And I think at the time it was not an  
12 unreasonable -- not an unreasonable expression by  
13 Dr. Wakeham that, look, everybody is doing this  
14 now. We have problems with this assay. We have  
15 disagreements with it. But we ought to consider  
16 using this assay now in addition to whatever else  
17 we're doing to evaluate our product design

18 changes.  
19 Q. Now, would it be proper if Philip Morris  
20 were doing its research to -- not to develop a  
21 safer product necessarily or not to develop a  
safer  
22 product, but instead to -- to defend against the  
23 public health community's publications that show  
24 that cigarettes were harmful?  
25 A. If that was the only purpose, it would  
7956  
1 not be proper.  
2 Q. Now, do you agree that Philip Morris  
3 engaged in research specifically to try and refute  
4 the Surgeon General?  
5 A. Philip Morris -- No, I don't. And the  
6 reason I don't is that whatever research  
7 Philip Morris engaged in at two fronts: One was  
to  
8 evaluate whatever product designs they had; and,  
9 two, when there was a publication dealing with a  
10 particular assay or a particular result,  
11 Philip Morris felt it had a responsibility to  
12 investigate that particular assay or result and  
13 then see whether, in terms of its own  
understanding  
14 of the assay, those conclusions were supported by  
15 the data.  
16 Q. Well, how about instead to counter the  
17 attacks?  
18 A. The only appropriate use of  
19 Philip Morris's evaluation of the science in  
20 addition to product design changes would be if in  
21 its estimation, carrying out a particular  
22 evaluation of somebody else's work, if there were  
23 significant problems or flaws either with a  
design,  
24 the experiment or the conclusions, I think it's  
25 appropriate for anybody, Philip Morris or anybody  
7957  
1 else, whether it's a company or A university or a  
2 scientist, to voice an opinion.  
3 Q. Did Philip Morris believe internally  
that  
4 the public health community, including the  
5 Surgeon General, was attacking him?  
6 A. I've never sensed that, no.  
7 Q. All right. Let me show you a series of  
8 documents.  
9 MR. WILNER: Thank you, Sheriff.  
10 MR. HARDY: May I see those again,  
11 please? I didn't know you were going to hand them  
12 to him in a series.  
13 MR. WILNER: Sorry.  
14 MR. HARDY: I have no objection to that.  
15 MR. WILNER: Do you want to do it one at  
16 a time? All right.  
17 MR. HARDY: Yeah.  
18 Q. BY MR. WILNER: Now, as I hand you that,  
19 I need to ask you another question. Remember you  
20 talked about INBIFO, I-N-B-I-F-O?  
21 A. Yes, sir.  
22 Q. That's the German organization, right,  
23 part of Philip Morris now?

24 A. Yes.

25 Q. And I think you said that that was doing  
7958

1 research for Philip Morris, right?

2 A. It still is, yes.

3 Q. Okay. And that when INBIFO was formed,  
4 was it formed to hide research that Philip Morris  
5 didn't want to do over here because they were  
6 afraid they might get caught?

7 A. Philip Morris was in existence before  
8 Philip Morris purchased it.

9 Q. I didn't understand that.

10 A. You asked me --

11 MR. HARDY: I think the witness  
misspoke,  
12 Your Honor. I think he meant to say INBIFO. He  
13 said, "Philip Morris was in existence before  
14 Philip Morris" --

15 THE WITNESS: Forgive me. INBIFO was in  
16 existence before Philip Morris purchased it. I'm  
17 sorry.

18 Q. BY MR. WILNER: Okay. But what I asked  
19 you is, did Philip Morris buy INBIFO so that it  
20 could send stuff overseas so it wouldn't get  
caught  
21 with material it didn't want other people to see?

22 A. No.

23 Q. Now --

24 A. No.

25 Q. Okay. Would you look at the document I  
7959

1 just gave you, dated February 24th, 1970, from  
2 Joseph Cullman to Helmut Wakeham?

3 A. Yes.

4 Q. Now, you remember who Joseph Cullman  
5 was? He was the -- at this point, 1970, he was  
6 head of the whole company, right?

7 A. Yes, sir.

8 Q. And Helmut Wakeham was head of the  
9 research and development department, right?

10 A. Yes, sir.

11 Q. And Cullman writes to Wakeham, and in  
12 this document is it not -- is it signed by  
Cullman?

13 A. Yes.

14 Q. And is it discussing in general the  
15 matters such as INBIFO and the company's policies  
16 on research?

17 A. Yes.

18 MR. WILNER: Offer it as the next  
19 number. Would like to show it.

20 MR. HARDY: No objection.

21 Q. BY MR. WILNER: Now, does it say --  
22 MR. HARDY: Let's get a number first.  
23 (Whereupon, Exhibit Number 387 was  
marked  
24 for identification and admitted into evidence.)

25 Q. BY MR. WILNER: All right. Now, this is  
7960

1 just a few months -- Let me get the exact date.  
2 This is the few months -- a few months after the  
3 1969 letter where Wakeham says, "We've got to  
4 start" -- "The conclusion is inescapable; we've

5 got to start testing," right?

6 A. This is one -- about one year later, a  
7 few months --

8 Q. One year later. Okay. So, now, Cullman  
9 begins to talk. And he says: "I enjoyed our  
10 conversation last Thursday in Richmond, and I hope  
11 that you feel it will serve to clear the air  
12 somewhat on the strong stand I have taken in  
13 connection with certain kinds of research  
14 activities by Philip Morris."

15 Now, were you -- Have you seen this  
16 document before?

17 A. I've been shown this document by  
18 lawyers.

19 Q. By lawyers? Did you not find it when  
you  
20 reviewed the history of the company?

21 A. I didn't review the history of the  
22 company. I reviewed scientific documents within  
23 R&D and INBIFO.

24 Q. Well, what kinds of research did the  
head  
25 of Philip Morris, Joseph P. Cullman, what kind of  
7961

1 research was he talking about when he said certain  
2 kinds of research he's taken a strong stand on?

3 A. I don't recall specifically. But I  
4 believe there are earlier memos between these two  
5 gentlemen in which this is -- this is discussed.  
6 And off the top of my head, I couldn't tell you.  
7 But I know there are other documents that I've

been  
8 shown in the same context that talk about this.

9 Q. Well, he's talking about testing the  
10 products over here and getting bad results that's  
11 going to fall into the hands of the public health  
12 community; isn't that right?

13 A. I don't know if that's what it is. If  
14 there's a document that speaks to that, we can

talk  
15 about it. But I know there are other documents  
16 that precede this that are somewhat more  
17 illuminating than just watching this and trying to  
18 speculate about what -- about what he meant.

19 Q. Well, based on all the documents you  
20 reviewed, are you disagreeing with me that what  
21 Cullman is saying is we don't want to do certain  
22 tests over here?

23 A. It's not a question of agreeing or  
24 disagreeing. All I'm saying is that there are  
25 prior documents that more clearly answer or get

7962  
1 closer to answering the question you're addressing  
2 rather than focusing on this document, that all I  
3 can do is tell you I can't remember specifically  
4 what he was talking about.

5 Q. All right. Well, if you have more  
6 documents, you let us know. But let's do this:  
7 "You have given me a better understanding of the  
8 rationale behind your position, and I repeat my  
9 assurances to you that my position is not  
10 intransigent, and I'm willing to discuss broad  
11 corporate policy in this area with you" -- "with

12 you, Ross and Cliff at regular intervals."  
13 Now, does this indicate to you that  
14 Wakeham had one position and Cullman, the boss,  
had  
15 another?  
16 A. I think that, again, there are prior  
17 documents and where they're discussing positions.  
18 And their positions -- Dr. Wakeham wants to do  
19 certain things in a certain way, and Mr. Cullman  
is  
20 asking him to provide additional rationales for it  
21 because he's, I believe, expressing some questions  
22 about this. And this is just another one of those  
23 documents. And he says he's not intransient  
24 [sic]. It would seem to me that Dr. Wakeham is  
25 starting to have an impact on Mr. Cullman's

7963

1 attitudes.

2 Q. Okay. So I feel our present  
3 position -- I feel -- "In the meantime, I feel our  
4 present policy is the correct one and that  
5 the" -- "and that the program you are carrying out  
6 in Boston is as far as we should go now." Right?

7 A. That's what it says.

8 Q. So he didn't want Wakeham to go any  
9 further, right?

10 A. Well, if that's the only piece of this  
11 you read, I would say you're right. But if you go  
12 above where he says "I'm not intransient [sic],"  
13 and you have the other documents that precede

this,  
14 you, I think, get a better sense that what Wakeham  
15 is talking about is clearly much broader than some  
16 limited program that Mr. Cullman seems to be  
17 focusing on in this one part of this one sentence  
18 of this document.

19 Q. Well, the document we just looked at a  
20 year ago said that -- Wakeham says, "The

conclusion  
21 is inescapable. We've got to start testing." And  
22 now Cullman says the program you're now carrying  
23 out is as far as we can go.

24 A. But he also says above that, and you  
read  
25 it, that I'm not intransient [sic]. And there's a  
7964

1 whole dialogue that's been going on here either  
2 prior to this -- not either -- prior to this, this  
3 one and subsequent to this.

4 Q. Well, Doctor, that's what we're trying  
to  
5 illuminate here. So let me go --

6 MR. WILNER: Ms. Stieger, please slide  
7 that up a little.

8 Q. BY MR. WILNER: Now, he says: "The  
9 possibility of getting answers to certain problems  
10 on a contractual basis in Europe appeals to me and  
11 I feel presents an opportunity that is relatively  
12 lacking in risk and unattractive repercussions in  
13 this country." Now, what -- what unattractive  
14 repercussions could come from Dr. Wakeham's  
15 research?

16 A. I guess there could be any -- any

17 number. But I think the answer to the question  
18 would be requiring Mr. Cullman to answer the  
19 question, rather than me going back almost 30  
years  
20 and trying to figure out what was in his head at  
21 the time.  
22 Q. So you have -- And you have talked about  
23 what Philip Morris has done over the years, right?  
24 A. Yes.  
25 Q. And your understanding of Philip Morris  
7965  
1 is not consistent with these historical documents,  
2 is it?  
3 A. No. It's not consistent with your  
4 interpretation, your suggestions about what  
certain  
5 words or parts of sentences might or might not  
6 mean.  
7 Q. Well, what are your suggestions to what  
8 it means? "I feel it presents an opportunity in  
9 Europe that's lacking in risk and unattractive  
10 repercussions in this country." What could he  
11 mean?  
12 A. Well, what could it mean? I think,  
13 again, just reflecting back in the ten years I was  
14 there, first of all, almost 1 million INBIFO  
15 documents are available in this public -- public  
16 depository.  
17 Number two, when I first came to  
18 Philip Morris and started reading the INBIFO  
19 documents, there were these numbers on the sides  
of  
20 some of these INBIFO documents. I didn't know  
what  
21 they were. I ignored them. Several years later I  
22 found out they're Bates numbers, which meant they  
23 were INBIFO documents that had been turned over in  
24 some -- in some litigation.  
25 Thirdly, the research activities that  
7966  
1 Mr. Wake -- Dr. Wakeham was planning to carry out  
2 regarding cigarette design -- and there are memos  
3 that occur about this time between these two  
4 gentlemen where Dr. Wakeham was talking about the  
5 fact that the laboratories that are available on a  
6 worldwide basis to do this kind of testing are  
7 limited and getting smaller and the number of  
8 people asking for the use of these laboratories is  
9 increasing, and some of these laboratories are  
10 having difficulty in terms of keeping up with the  
11 work. So you have to wait in line to do it.  
12 Fourthly, that to do work in these  
13 laboratories by Philip Morris would make available  
14 in terms of security some of the cigarette design  
15 changes that we were doing potentially to our  
16 competitors who would be using the same facility.  
17 So those would be at least four examples  
18 I can think of off the top of my head.  
19 Q. And those are unattractive  
repercussions?  
20 A. If one of our competitors found out what  
21 we were doing on a cigarette design change, I  
think

22 so.  
23 Q. Lacking in risk?  
24 A. Yes.  
25 Q. And you said that you saw some of these  
7967  
1 documents that showed up in litigation?  
2 A. Yes.  
3 Q. And your -- And from that you understand  
4 that the INBIFO documents were public because they  
5 were subpoenaed in litigation?  
6 A. There were 800,000 -- over 800,000  
INBIFO  
7 documents sent in the Minnesota depository.  
8 Q. Since when?  
9 A. Whenever that was required.  
10 Q. 1998.  
11 MR. HARDY: Excuse me. Object to  
Counsel  
12 testifying, if that's a question.  
13 Q. BY MR. WILNER: Well, when did you  
14 first --  
15 THE COURT: Well, overruled.  
16 Q. BY MR. WILNER: Wasn't that 1998?  
17 A. It was recently, yes.  
18 Q. All right. We're talking about things  
19 that were talked about in 1970. Was it their  
20 intent to conceal these in 1970?  
21 A. No. As I said to you, when I came to  
22 Philip Morris over ten years ago and read INBIFO  
23 documents, they had already been provided in other  
24 litigation based upon the Bates stamp numbers  
25 they've -- that were printed along the bottom of  
7968  
1 the documents.  
2 Q. And that was 1988. So you're now saying  
3 they meant to conceal them in 1970, but somebody  
4 subpoenaed them in 1988?  
5 A. No. You're saying that. All I'm saying  
6 is when I came in in actually 89, these documents  
7 already existed. And they were older documents.  
I  
8 don't know. I never asked for what case they were  
9 subpoenaed. It was not of interest to me at the  
10 time nor is it now.  
11 Q. Let me hand you another document on the  
12 same issue and clear it up. 137. Thank you.  
13 Now, is this a letter from Wakeham to  
14 Mr. C. H. Goldsmith of Philip Morris?  
15 A. Yes, sir.  
16 Q. Does it have Philip Morris letterhead on  
17 it?  
18 A. Yes.  
19 Q. And it's dated April 7th, 1970?  
20 A. Yes.  
21 MR. HARDY: I have no --  
22 (Discussion off the record.)  
23 MR. WILNER: Okay. We offer page 1 as  
24 our next numbered exhibit.  
25 MR. HARDY: No objection.  
7969  
1 (Whereupon, Exhibit Number 388 was  
marked  
2 for identification and admitted into evidence.)

3 Q. BY MR. WILNER: All right. Doctor, I'll  
4 move through this fast. This is more going on  
when  
5 INBIFO was actually bought, right? This is what  
6 was going on when INBIFO was purchased by  
7 Philip Morris, right?  
8 A. This is, I think, just prior to that. I  
9 believe that's correct.  
10 Q. And actually Wakeham says that we can  
11 buy -- Actually for \$190,000, and its price  
12 includes physical laboratory and good will and all  
13 this.  
14 MR. WILNER: And if you would slide that  
15 up, Ms. Stieger.  
16 Q. BY MR. WILNER: And it says: "Since we  
17 have a major program at INBIFO and since this is a  
18 locale where we might do some of the things which  
19 we are reluctant to do in this country, I  
recommend  
20 that we acquire INBIFO either in toto or to the  
21 extent of a controlling interest." Do you see  
22 that?  
23 A. Yes, sir.  
24 Q. What things were they reluctant to do in  
25 the United States of America?  
7970  
1 A. Actually the things -- the answers I  
just  
2 gave you to this February 24th, 1970, memo, I  
would  
3 give you the same answers that I gave you on that.  
4 Q. Okay. Let me hand you another document  
5 dated March 31st, 1977. And is this a letter from  
6 Robert B. Seligman also Philip Morris?  
7 A. Yes, sir.  
8 Q. This is up to 1977?  
9 A. This was an unsigned letter, at least  
10 that's based on the copy. It's hard to read this.  
11 But this is two pieces of paper with a date on it,  
12 but it's not -- at least my copy is not signed.  
13 Q. Does that bother you?  
14 A. Yes.  
15 Q. Oh, you mean you don't think it was sent  
16 to Dr. Max Hausermann of Philip Morris  
17 Europe S. A.?  
18 A. I would have no idea.  
19 Q. Well, let's go on the assumption that  
20 when Robert B. Seligman types his name down there,  
21 that this is just a poor copy and we can't see his  
22 signature. But let's go forward on that  
23 assumption. Is there something -- Do you have  
some  
24 evidence that this document was not sent?  
25 A. Well, all I can tell you is in my  
7971  
1 experience at Philip Morris unsigned letters or  
2 unsigned memos generally aren't sent.  
3 Q. Do you mean he would put this letter and  
4 then say "attachments" and then just leave it in  
5 the file?  
6 A. I really don't know.  
7 Q. Well, let's just see how reasonable that  
8 is, Doctor. If -- Who is the addressee, Dr. Max

9 Hausermann?  
10 A. Pleaserman (phonetic).  
11 Q. Pleaserman. Philip Morris S. A., do you  
12 know who that is?  
13 A. Yes.  
14 Q. Research and Development, Post Office  
15 Box 11, 2003 Neuchatel, Switzerland?  
16 A. Neuchatel.  
17 Q. Neuchatel. Is that the correct address?  
18 It would get there if sent?  
19 A. It would get there even without the  
20 address. Just putting Philip Morris and

Neuchatel,

21 it would get there.  
22 Q. "Dear Max," is that how he refers to Max  
23 as?  
24 A. They're good colleagues.  
25 Q. And do you know the subject matter of

7972

1 this letter? Have you seen this letter before?

2 A. Again, I've been shown this letter in  
3 litigation.

4 MR. WILNER: Okay. I move this in.

5 MR. HARDY: No objection.

6 THE COURT: All right.

7 (Whereupon, Exhibit Number 389 was

marked

8 for identification and admitted into evidence.)

9 Q. BY MR. WILNER: Now, this is seven years  
10 after they buy INBIFO, right?

11 A. Yes, sir. Well, I think they bought  
12 INBIFO in 71, 72. But close enough, yes.

13 Q. I received a copy of Helmut Gaisch's  
14 letter of March 24th, letter to Jerry Osmolov.  
15 Who's Jerry Osmolov?

16 A. I don't know who Jerry Osmolov is. I  
17 know who Helmut Gaisch is.

18 Q. All right. "Concerning pesticide

residue

19 analyses. As you were copied, you know that  
20 Helmut was requesting we send samples directly to  
21 INBIFO. This suggested procedure is in direct  
22 conflict with our communications with the New York  
23 office." Where is Philip Morris's office?

24 A. New York.

25 Q. "We have gone to great pains to

eliminate

7973

1 any written contact with INBIFO, and I would like  
2 to maintain this structure." Now, is that true?

3 A. Not in the ten years I was with the  
4 company, no.

5 Q. Well, what would be the  
6 purpose -- Assuming that this is correct, what  
7 would be the purpose in Philip Morris going to  
8 great pains to eliminate any written  
9 contract -- any written contact with INBIFO who  
10 they just bought?

11 A. Wouldn't make any sense.

12 Q. So you -- your understanding of things  
13 cannot be -- be jibed with this historical record?

14 A. No.

15 Q. All right. "Therefore, I'm advising

16 Jerry Osmolov to continue sending samples to  
17 Neuchatel for transshipment to INBIFO. If this  
18 procedure is unacceptable to you, perhaps we  
should  
19 consider a dummy mailing address in Koln for the  
20 receipt of the samples."  
21 Now, why would they be setting up dummy  
22 mailing addresses?  
23 A. Beats me. I really don't know.  
24 Q. Okay. Let me hand you another document.  
25 Have you seen that document before?

7974

1 A. Yes. Again, under the same  
2 circumstances.  
3 Q. All right. And the circumstances were  
4 what?  
5 A. Litigation. Plaintiffs' lawyers have  
6 shown this to me.  
7 Q. And have you verified that this document  
8 occurs in the files of Philip Morris?  
9 A. I've been shown this document. I have

no  
10 way -- no way of knowing whether this is an  
11 official Philip Morris document or not.  
12 Q. You have no way. I thought you had  
13 access to the files?  
14 A. As I said to you, the -- I had access to  
15 the files. My job was to deal with the science.

I  
at  
you  
16 focused on the scientific information in R&D and  
17 INBIFO.  
18 Q. Well, if you focused on INBIFO, would  
19 be concerned if documents were being destroyed at  
20 INBIFO?  
21 A. Of course.  
22 Q. Okay.  
23 MR. HARDY: Your Honor, I think at this  
24 point I have an objection to any further questions  
25 unless he establishes proper foundation.

7975

1 MR. WILNER: I'm in the middle.  
2 THE COURT: Let me see the document,  
3 Sheriff.  
4 Well, I'm going to allow him to go a  
5 little bit farther, Mr. Hardy, but without  
6 reference to the content of the document. And  
7 let's see what his foundation is.  
8 Q. BY MR. WILNER: Did you ever investigate  
9 the question of whether documents were destroyed

at  
10 INBIFO?  
11 A. Yes.  
12 Q. And, in doing so, did you review the  
13 files of Philip Morris?  
14 A. I reviewed -- I reviewed the document  
15 system both in Richmond and in INBIFO.  
16 Q. What do you mean "the document system"?  
17 A. Just that, there are document policies  
18 and document systems in both -- in both places. I  
19 looked at those policies. I looked at those  
20 systems. I've looked at the documents.

21 Q. Did you --  
22 MR. HARDY: Excuse me, Your Honor. I  
23 understood the Court's ruling to mean that  
24 Mr. Wilner was permitted to ask a foundation  
25 question about the witness's ability to identify

7976

1 what that document is.

2 MR. WILNER: I am, Your Honor. I'm  
3 trying to get there.

4 THE COURT: Well, I would suggest you  
5 hasten to that point.

6 Q. BY MR. WILNER: Did you review the  
7 documents of Dr. Thomas Osdene who testified in  
8 this case?

9 A. I have reviewed memos from Dr. Osdene.

of

10 Q. And how did you get to reviewing memos

11 Dr. Osdene?

12 A. They were contained in the files of  
13 Philip Morris.

doing

14 Q. And did you review the files of  
15 Philip Morris to find out what Dr. Osdene was

16 about documents from INBIFO?

recall

17 A. As far as I can remember. I don't

Osdene

18 reading any -- any documents prepared by Dr.

19 or sent to doctor --

20 THE COURT: I think at this point we're  
21 going to sustain the objection to the document

with

22 regard to foundation.

23 MR. WILNER: May I just ask him,  
24 Your Honor, if he recognizes the handwriting on  
25 it?

7977

1 THE COURT: Well, you can ask him that.  
2 That would be more direct and to the point.

3 Q. BY MR. WILNER: Do you recognize the  
4 handwriting on this document?

5 A. No.

6 Q. Did you take any steps to find out when  
7 it was shown to you earlier?

8 A. You mean, who wrote this document?

9 Q. Yeah.

10 A. No, sir.

11 Q. Okay.

12 THE COURT: All right. Let's go on.  
13 Let's take a ten-minute recess.

14 (Whereupon, the jurors were excused from  
15 the courtroom.)

16 (Whereupon, a 25-minute recess ensued at  
17 11:33 a.m.)

18 (Out of the presence of the jury.)

19 THE COURT: Ready for the jury?

20 MR. WILNER: Yes, Your Honor.

21 MR. HARDY: Yes, Your Honor.

22 (Whereupon, the jury was seated in the  
23 jury box.)

24 THE COURT: Thank you.

25 Mr. Wilner, you may continue.

7978

1 MR. WILNER: Thank you, Your Honor.  
2 Q. BY MR. WILNER: Doctor, remember  
3 yesterday we talked about Philip Morris providing  
a  
4 psychological crutch to its consumers?  
5 A. No, I don't.  
6 Q. You don't remember that whole  
discussion?  
7 A. Not about Philip Morris. I remember a  
8 letter from Mr. Weissman to somebody elsewhere.  
9 Mr. Weissman uses that term. But that was one  
10 person writing -- I think it was to Mr. Cullman,  
as  
11 a matter of fact. You described it as a  
12 discussion. But it was Philip Morris. But it  
13 seemed to me it was one person. But that's my  
14 recollection.  
15 Q. And that one person was the person who  
16 was in charge of Philip Morris at the time, wasn't  
17 it?  
18 A. No. The -- Well, it was Weissman to  
19 Cullman. Cullman was really the top dog, if you  
20 will.  
21 Q. In 1967. And that was 1966, and  
Weissman  
22 was the CEO, and Cullman was the vice CEO; isn't  
23 that true?  
24 A. I don't know.  
25 Q. You just tried to testify. You don't  
7979  
1 know, do you?  
2 A. No. I didn't remember the year. But  
3 Cullman was the top dog. I don't believe --  
4 Q. When that letter was written Weissman  
was  
5 the CEO and Cullman was the vice CEO?  
6 A. I don't know that.  
7 Q. Okay. You don't know one way or the  
8 other, do you?  
9 A. That's correct.  
10 Q. All right. And if Weissman was the CEO  
11 in charge of Philip Morris, your position still is  
12 it's just one man's opinion?  
13 A. If he was the CEO of Philip Morris, I  
14 don't remember him ever being the CEO of  
15 Philip Morris. It is his opinion -- I don't  
16 remember seeing any response from Mr. Cullman, nor  
17 do I remember seeing anything in terms of the  
18 company's behavior that would say that anybody  
19 acted upon that one way or the other.  
20 Q. Well, if your boss tells you that this  
is  
21 the policy, what are you supposed to do?  
22 A. I don't know that Mr. Weissman was  
23 Mr. Cullman's boss.  
24 Q. Doctor, let's discuss it from this point  
25 of view: Would you say that if Philip Morris did  
7980  
1 research to counter the attacks being launched  
2 against its products, that that would be a method  
3 of supplying a psychological crutch to its  
4 smokers?  
5 A. It might be considered that, yes.

6 Q. Okay. So let's go back to what has been  
7 marked in evidence as our first number today,  
which  
8 is the letter from Joseph Cullman to  
9 Helmut Wakeham, dated February 24th, 1970. What I  
10 didn't read the first time through, and I  
11 apologize, is?

12 MR. WILNER: Ms. Stieger, if you would  
13 slide it up a little? Thank you.

14 Q. BY MR. WILNER: And this is -- Remember,  
15 this is Cullman, who is now at this time head of  
16 the company, telling Wakeham, "I would also like  
17 you to continue to keep us fully informed on  
18 research developments that you think would help  
19 Philip Morris and the industry to counter the  
20 attacks being launched against our products." Do  
21 you see that?

22 A. Yes, sir.

23 Q. Is that what Philip Morris's research  
was  
24 for?

25 A. As I said earlier, the only two things  
7981  
1 that Philip Morris did, as far as I can tell from  
2 the research documents and from the people I spoke  
3 to, if somebody -- if somebody published a  
4 document, a report or a study, Philip Morris would  
5 investigate. If there was a problem with that  
6 report, then they would comment on it. If there  
7 was no problem with it, they wouldn't comment on  
8 it.

9 Q. Well, I guess my question is broader.  
10 Did Philip Morris have the intent to go out and do  
11 the kind of research that I thought would help to  
12 counter the attacks being launched against its  
13 product?

14 A. No. I think they evaluated all the  
15 research and all of the allegations that were  
16 mounted against either the company or the product,  
17 as you would expect anybody to be able to do.

18 Q. And these attacks, they came from  
19 the -- as you've said, the public health  
community,  
20 including the Surgeon General, right?

21 A. I didn't say that.

22 Q. Well, do you say it now?

23 A. I wouldn't -- I wouldn't call them -- I  
24 wouldn't call them attacks.

25 Q. Well, the head of Philip Morris called  
7982  
1 them attacks, didn't he?

2 A. Well, he doesn't really specify who  
3 they're coming from as far as I can tell here.

4 Q. Well, who were they coming from?

5 A. Well, I don't know.

6 Q. You don't know?

7 A. In 1970 what was in Mr. Cullman's mind,  
8 how could I possibly know that?

9 Q. So when he says you don't think -- "help  
10 counter the attacks being launched against our  
11 products," you don't understand that to mean the  
12 attacks of the public health community and the  
13 Surgeon General?

14 A. It could very well be, but I don't know  
15 that for a fact.  
16 Q. Could very well be. All right. In  
fact,  
17 the Surgeon General had continued to publish in  
18 1964, 1967, right? 1969, correct?  
19 A. Yes.  
20 Q. And all these were consistent with the  
64  
21 report and, in fact, amplified it, right?  
22 A. Yes.  
23 Q. And all of them agree that cigarette  
24 smoking was causally related to lung cancer,  
25 correct? Correct?

7983

1 A. If we -- If we reflect back on the basis  
2 for the Surgeon General's 64 report, then my  
answer  
3 is yes.  
4 Q. And they all followed up on that with  
5 more and more research and disclosure, true?  
6 A. Yes.  
7 Q. And Philip Morris's head or the head of  
8 Philip Morris at this time told Wakeham to go back  
9 and see if he could do some research to counter  
10 this, right?  
11 A. Well, that's -- that's your suggestion,  
12 sir. But I will just submit that the significant  
13 amount of research funded either directly or  
14 indirectly by Philip Morris found its way into the  
15 U.S. Surgeon General's reports over the years,  
16 hardly what I would consider consistent with  
17 countering, if the U.S. Surgeon General is  
18 incorporating that information into their reports.  
19 Q. Well, citing something in the  
20 Surgeon General's report does not necessarily mean  
21 it's cited with approval, does it?  
22 A. It's not a question of approval or  
23 disapproval. The question you're asking me is  
24 countering the U.S. Surgeon General's report. If  
25 you look at the scientific documents that the U.S.  
7984  
1 Surgeon General incorporated that were funded in  
2 part or directly by Philip Morris, those were  
3 documents that the U.S. Surgeon General felt were  
4 of a sufficient quality to be included in their  
5 report and deal with their evaluations at the  
6 time. And they dealt with tobacco and smoking.  
7 Q. And how much was funded by Philip Morris  
8 that never saw the light of day?  
9 A. In terms of smoking and health?  
10 Q. Correct.  
11 A. I'm sorry?  
12 Q. Correct.  
13 A. I don't know. I can't give you a number  
14 to that.  
15 Q. You said "funded indirectly"; you  
16 remember that?  
17 A. I did.  
18 Q. What were you speaking of when you said  
19 "funded indirectly"?  
20 A. Through the Council of Tobacco Research,  
21 for example.

22 Q. The CTR?  
23 A. Yes, sir.  
24 Q. So Philip Morris was one of the sponsors  
25 of the CTR of course, right?

7985

1 A. Yes, sir.

2 Q. One of the people in it from the  
3 beginning, right?

4 A. Yes, sir.

5 Q. Contributed money and had -- and had a  
6 direction in which way it was going, true?

7 A. Not -- not that part of the CTR I'm  
8 referring to.

9 Q. Well, let me ask you this: Would you  
say

10 that according to Philip Morris the purpose of the  
11 CTR was to find evidence which denies the  
12 allegation that cigarette smoking causes disease?

13 A. I've seen documents --

14 MR. HARDY: Your Honor, excuse me.

15 THE WITNESS: Sorry.

16 MR. HARDY: Excuse me. I would like to  
17 object to this and ask to approach the bench.

18 THE COURT: All right.

19 (Whereupon, the following discussion  
took

20 place at the bench.)

21 MR. HARDY: Do you have a clean copy of  
22 that document?

23 MR. WILNER: Well, I don't know that  
I'll

24 need the document if he agrees with me.

25 MR. HARDY: Here's the basis for my

7986

1 objection, Your Honor. Obviously the issue of CTR  
2 has some relevance in this case, but I did not ask  
3 this witness any questions at all on direct  
4 examination about CTR. I never mentioned CTR in  
5 any way.

6 And I believe what Mr. Wilner is trying  
7 to do now is to set up by asking questions from  
8 a -- from a particular Philip Morris document that  
9 involves a discussion by CTR, and I have the  
10 document here. He's trying to set it up so he can  
11 put that document in through Dr. Carchman.

12 I believe that if the document is  
13 relevant and should come into evidence -- whether  
14 it is or not, stands or falls without regard to  
15 Dr. Carchman, and I don't think we should -- I  
16 don't think it's proper to go into this topic with  
17 the witness since I didn't do it on direct at all.

18 THE COURT: Well, I'm kind of at a loss  
19 because I don't know what the document is. Do you  
20 have the document?

21 MR. WILNER: Well, I do have a document.  
22 I have many documents. But so far I've just asked  
23 him a question about the CTR. But that is a  
24 document from Philip Morris, which Counsel has  
25 agreed is authentic and correct. So I may -- I

may

7987

1 ask him to look at it. It depends on what he  
2 says.

3 MR. HARDY: The document was offered by  
4 plaintiffs' counsel on March 12th to the Court and  
5 excluded at that time on the basis primarily the  
6 foundation. And I have advised Counsel that I do  
7 not have any foundation objection anymore. But my  
8 objection is that it's marginal relevance. It  
9 involves just a sort of a think piece by  
10 Dr. Wakeham, his ideas about various things that  
11 CTR could be, what its purpose is, what he thinks  
12 its purpose ought to be, what are the various  
13 alternatives.

14 MR. WILNER: Well, that goes to --

15 MR. HARDY: And I think it has, at best,  
16 marginal relevance. But I don't know how to make  
17 that point without allowing the Court to read the  
18 document.

19 MR. WILNER: A, I haven't offered it.  
20 But, B, that goes to weight. If he wants to say,  
21 "Well, it wasn't acted on, or it's just a think  
22 piece," I think that's fine. But those are  
23 arguments that the trier of fact has to resolve.

24 MR. HARDY: Again, my point is that this  
25 document should come in or be excluded without

7988

1 regard to Dr. Carchman.

2 MR. WILNER: Maybe it will be when we

get

3 to that. But, Your Honor, if only to say that  
4 while the CTR witness was up we couldn't discuss  
5 this document because we couldn't lay a foundation  
6 to who Wakeham was. Now we have a Philip Morris  
7 person who can say who Wakeham was.

8 MR. HARDY: I've waived that objection.

9 MR. WILNER: No. I understand. That's  
10 why it's coming up now. And it wasn't able to be  
11 brought up earlier because it was objected to, and  
12 we couldn't do anything with Wakeham, so now we  
13 can.

14 MR. HARDY: I think we're going to be  
15 here for a considerable length of time if we're  
16 going to deal with the CTR on a witness who has

not

17 dealt with CTR at all.

18 MR. WILNER: Well, he mentioned it just  
19 now on indirect. And I have one paragraph that I  
20 want to read to him and that is all.

21 MR. WILNER: He mentioned it because you  
22 asked him about it.

23 THE COURT: Just a minute. Which  
24 paragraph are you talking about?

25 MR. WILNER: Right here. That's the

7989

1 Paragraph Number 2. That's the only one I can --

2 MR. HARDY: As I say, Your Honor, I  
3 believe that the document stands or falls without  
4 regard to Dr. Carchman. And I must say that this  
5 particular document -- more damage would be done  
6 by -- there would be a greater prejudicial effect  
7 and misleading effect to simply let him put in

that

8 one paragraph.

9 THE COURT: Well, I'm going to allow him  
10 to -- to ask as it relates to this Paragraph 2.

any  
subject  
11 Now, that's not to prevent you from bringing in  
12 other part of it that you feel -- of course  
13 to any objection that may be raised by Mr. Wilner.  
14 But it does seem to me that this witness  
15 is on the stand as a representative of Philip  
16 Morris. And to the extent that he as a spokesman  
17 and representative of the company with  
18 regard -- and I understand he's retired now -- but  
19 can provide any information or opinion related to  
20 the company's view of the role of CTR or the  
21 comments from Mr. Wakeham vis-a-vis his own  
22 awareness of the company is proper area for  
23 cross-examination, so I'll allow that.  
24 MR. HARDY: All right. Thank you,  
25 Your Honor.

7990

1 (Whereupon, the bench conference is  
2 concluded.)  
3 Q. BY MR. WILNER: Was it Philip Morris's  
4 view that the CTR's purpose was to find evidence  
5 which denies the allegation that cigarette smoking  
6 causes disease?  
7 A. As I tried to say right before this, I  
8 have seen -- I've been shown documents, a variety  
9 of documents. And I believe I've seen a number of  
10 documents and at least one of them speaks  
11 to -- speaks to that issue.  
12 Q. So are you saying that you agree that it  
13 was Philip Morris's position that the CTR was  
there  
14 to find evidence to deny the allegations?  
15 A. No, sir. What I said I've seen a number  
16 of documents that speak to a variety of issues,  
and  
17 one of those documents mentions that particular  
18 point.  
19 Q. All right. Since you mentioned it,  
20 let's --  
21 MR. WILNER: May I, Sheriff?  
22 Q. BY MR. WILNER: All right. You  
mentioned  
23 you saw documents. Is this one of them?  
24 A. Yes, sir.  
25 Q. So you've seen this under what

7991

1 circumstances?  
2 A. Under litigation circumstances.  
3 Q. All right. It purports to be a document  
4 from Helmut Wakeham, the head of the research  
5 department, right?  
6 A. Yes.  
7 Q. To Joe Cullman, the head of the company,  
8 right?  
9 A. Yes, sir.  
10 Q. And the date is September 8th, 1970,  
11 which puts it right in the same time frame as the  
12 last one we looked at, right?  
13 A. That's correct.  
14 Q. Okay. So and you were mentioning what  
we  
15 just talked about the last one, whether the

16 Philip Morris research was designed to counter the  
17 public health community, and now we're going to  
18 talk about whether CTR research was designed to do  
19 that too.

20 A. That was your question.

21 MR. WILNER: Okay. I move it in.

22 THE COURT: Is there objection?

23 MR. HARDY: I don't have anything to add  
24 to what I said at the bench, Your Honor.

25 THE COURT: Why don't you lawyers come  
7992

1 back and approach.  
2 (Whereupon, the following discussion  
took  
3 place at the bench.)

4 THE COURT: Now, I -- Let me be clear.  
5 My ruling was not at that point -- Although now I  
6 have to consider whether to allow the document as  
7 an exhibit. But I was only allowing him to  
8 question the witness with respect to that  
9 paragraph.

10 MR. WILNER: I understand.

11 THE COURT: So that's why I don't know  
12 quite what your position is as far as the exhibit  
13 on it, which goes beyond what I ruled on  
14 previously.

15 MR. HARDY: I understand, Your Honor.

My  
16 position is that is sort of a think piece by  
17 Dr. Wakeham offering various alternatives,  
18 possibilities for the use of CTR to Dr. Cullman or  
19 to Mr. Cullman. And as such I think it has, at  
20 best, marginal relevance. That's --

21 MR. WILNER: We would say that goes to  
22 the weight. He can certainly testify to that.

23 THE COURT: Well, if that's the only  
24 basis of your objection, then --

25 MR. HARDY: Well, I think it is.  
7993

1 THE COURT: All right. Then I'll allow  
2 it in.  
3 (Whereupon, the bench conference is  
4 concluded.)

5 THE COURT: All right. We'll have the  
6 document marked.

marked  
7 (Whereupon, Exhibit Number 390 was  
8 for identification and admitted into evidence.)

9 Q. BY MR. WILNER: All right, sir. Now,  
you  
10 are familiar that in this period of time  
11 Dr. Wakeham was discussing with the head of the  
12 company, Mr. Cullman, what might -- what the  
13 company's position on this CTR should be. Do you  
14 remember that?

15 A. Yes, sir.

16 Q. And they say: In retrospect the  
17 November 30 meeting of the CTR Executive  
Committee,  
18 it might be appropriate to comment on the  
question,  
19 what kind of CTR program is best for the industry?  
20 Do you see that?

21 A. Yes, sir.  
22 Q. Has that always been the belief at  
23 Philip Morris, what kind of program is best for  
the  
24 industry?  
25 A. I don't know the answer to that. 7994

1 Q. Well, has -- has Philip Morris ever said  
2 what kind of CTR program is best for its customers  
3 and their health?  
4 A. The way CTR is set up, the company  
5 provided money to CTR. And the outside Scientific  
6 Advisory Board, which is not made up of anybody  
7 from the industry, the very prominent scientists  
8 from around the country, that got in applications,  
9 and they decided where the money -- where the  
money  
10 went.  
11 So to the extent that we provided money  
12 amongst -- amongst others and somebody else  
decided  
13 where that money was spent and how it was meant, I  
14 don't -- I don't understand how that relates to  
15 this question.  
16 Q. Well, so you don't understand what  
17 Dr. Wakeham could possibly be meaning when he says  
18 what kind of CTR program is best for the industry?  
19 A. Well, I can see from the dimension that  
20 if we're providing money, what are we getting out  
21 of it. And that is not an unreasonable question  
to  
22 ask.  
23 Q. Well, has it -- was it asked in terms of  
24 what is the health of our customers? How is the  
25 health of our customers benefitting from it? 7995

1 A. Actually, in looking through the rest of  
2 this document, Dr. Wakeham raises a series of  
3 options because he basically says in here that  
4 there were a variety of opinions expressed -- I  
5 would have to go back and find it -- which would  
6 mean that different people, whoever was a part of  
7 this in terms of financial contributions, had  
8 different opinions. And he goes through a variety  
9 of options. And some of those options that he's  
10 talking about go directly to the consumer.  
11 Q. All right. Well, let's see what they  
12 are. Number 2: It has been stated that CTR is a  
13 program to find out, quote, the truth about  
smoking  
14 and health.  
15 And it has been stated, hasn't it,  
16 publicly by the cigarette industry and by CTR,  
17 right?  
18 A. I believe that's correct, yes.  
19 Q. "What is truth to one is false to  
20 another. CTR and the industry have publicly and  
21 frequently denied what others find as truth."  
Now,  
22 that's true, isn't it?  
23 A. I believe there are circumstances where  
24 that's clearly the truth, yes.  
25 Q. "CTR and the industry have publicly and

1 frequently denied that cigarettes cause cancer."  
2 True?

3 A. Does that -- you're not going to read --

4 Q. I'm asking you, isn't that true?

5 A. Could you repeat it, please?

6 Q. Never mind.

7 "Let's face it. We are interested in  
8 evidence which we believe denies the allegation  
9 that cigarette smoking causes disease." Now, is  
10 that consistent with your understanding of  
11 Philip Morris's policy towards the CTR?

12 A. As I told you, Philip Morris's policy,

as

13 far as I know, is to provide money for outside  
14 scientists, then distribute it to who they felt  
15 were worthwhile scientific research projects.

16 Q. Let me see if I can clarify my question.  
17 Is that consistent or inconsistent with your view  
18 of what Philip Morris's policy is?

19 A. I think it's inconsistent.

20 Q. Inconsistent?

21 A. That the only thing that Philip Morris

is

22 interested in is evidence which denies the  
23 allegation.

24 Q. All right. I'm just trying to make this  
25 straight. You think it's inconsistent, right?

1 A. Yes.

2 Q. All right. So your view of the  
3 historical record is inconsistent with the  
4 historical documents?

5 A. As --

6 Q. Isn't that true?

7 A. As you're reading this one particular  
8 document, yes.

9 Q. Well, sir, we can only read one at a  
10 time. Have you been inconsistent with more than  
11 one?

12 MR. HARDY: Objection.

13 MR. WILNER: Never mind, withdraw it.

14 THE COURT: Sustained.

15 Q. BY MR. WILNER: Let's look at  
16 Mr. Cullman. Now, remember Mr. Cullman was the

one

17 who Helmut Wakeham wrote in 1961, said we've got  
18 carcinogens in the product we can't go out, right?

19 A. He wrote -- I remember that --

20 Q. Okay.

21 A. -- that memo, yes.

22 Q. And Mr. Cullman, then, in  
23 1966 -- remember, he gave that speech. And he

said

24 if there's anything in the product, we think we

can

25 get it out, right?

1 A. This was the speech to the tobacco  
2 growers?

3 Q. True.

4 A. Yes.

5 Q. Okay.

6 A. Uh-huh.  
7 Q. And so what was Mr. Cullman's view in  
8 1973 as we move up just a few more years?  
9 A. You're asking me as I sit here today?  
10 Q. Well, I don't know. You seem to feel  
11 that Mr. Cullman had some change in position. You  
12 testified to that earlier?  
13 A. Yes. I testified to that yesterday.  
14 Q. In fact, you said that he said before  
15 some kind of a hearing that it was true that  
16 cigarettes cause disease?  
17 A. No. Actually what I said -- we can go  
18 back to the record -- he very specifically said in  
19 response to Mr. Dingle's question about the  
warning  
20 label at the time, "Would you agree that  
cigarettes  
21 may be injurious to health?" And he said, "Yes."  
22 Q. Okay. Well, let's see what he said in  
23 1973.  
24 MR. WILNER: Counsel, do you mind?  
25 MR. HARDY: No.  
7999  
1 MR. WILNER: Okay. I would like to hand  
2 this to the witness.  
3 Do you have yours? Thank you.  
4 Q. BY MR. WILNER: Would you look at the  
5 title to this and who wrote it, please?  
6 A. Yes.  
7 Q. Does it say Joseph F. Cullman the third,  
8 chairman of the board, Philip Morris?  
9 A. Yes, it does.  
10 Q. Is there anybody higher up in  
11 Philip Morris than the chairman of the board?  
12 A. In the company, no.  
13 Q. So he is the boss?  
14 A. Yes, sir.  
15 Q. And does it -- And the title of it is  
16 "The Noncase against Cigarette Smoking"?  
17 A. Uh-huh. That's what it says, yes.  
18 Q. Is there a picture of Joseph Cullman on  
19 page 2?  
20 A. I believe so.  
21 Q. Is he holding a cigarette?  
22 A. And it's smoking, yes.  
23 Q. And does this appear to be a printed  
24 piece?  
25 A. I have no idea what it is.  
8000  
1 Q. Well, you see it's not typed. It's a  
2 printed document, correct?  
3 A. Okay.  
4 Q. Is that not clear to you?  
5 A. It's a document, a copy of a document  
6 that Mr. Cullman's picture and name appear on.  
7 Q. All right. Would you turn to  
8 the -- what's showing as page 15 of 17 in the  
lower  
9 left corner and verify the signature of Joseph F.  
10 Cullman the third?  
11 A. I can't verify his signature.  
12 Q. Well, you can observe that he signed  
this

13 document?  
14 A. Page 5 of 17, did you say?  
15 Q. Page 15 of 17.  
16 A. Sorry. Yes.  
17 Q. All right. And would you look at the  
18 table of contents, please.  
19 MR. HARDY: Your Honor, I think I want  
to  
20 object to this manner of questioning the witness  
do  
21 about the document. I think the proper thing to  
22 is to ask him if he's seen it at this point to  
23 establish foundation.  
24 MR. WILNER: There's lots of foundations  
25 besides whether he's seen it.  
8001  
1 THE COURT: Let me see the document,  
2 Sheriff.  
3 THE SHERIFF: Yes.  
4 THE COURT: Objection overruled.  
5 Q. BY MR. WILNER: I will ask you now, have  
6 you seen this document?  
7 A. No, sir.  
8 Q. Have you looked for statements made by  
9 the company appearing in --  
10 A. Not generally, no.  
11 Q. Okay. Would you look at the table of  
12 contents, rather the first page of the document.  
I  
13 guess it doesn't have a table of contents. Just  
14 the first page.  
15 A. Yes.  
16 Q. Does it appear to concern matters of the  
17 public -- the company's public position or at  
least  
18 Mr. Cullman's position at that time on smoking and  
19 disease?  
20 MR. HARDY: Your Honor, may we approach?  
21 THE COURT: You may.  
22 (Whereupon, the following discussion  
took  
23 place at the bench.)  
24 MR. HARDY: This is a new document.  
25 "New" in the sense it was provided to me by  
8002  
1 Mr. Wilner yesterday. It was not part of the  
2 exhibit list.  
3 So I do not have any information about  
4 this. I don't know whether this document ever  
went  
5 anywhere. I don't know whether it was a business  
6 record of Philip Morris. I don't know whether it  
7 was ever published. I don't know who it was  
8 intended for.  
9 And I think the fact that it -- the fact  
10 that it is a document which appears to have been  
11 signed by the president of the company is not  
12 enough, unless there's some sort of indication  
that  
13 this document went out to the public or went to  
14 somebody. We don't know whether it went to -- I  
15 don't know where it came from. I don't know  
16 whether it's a part of the business record of the

17 company. I know nothing about what -- about this.  
18 I don't know what it says.  
19 MR. WILNER: Well, signed by the CEO is  
20 enough to determine what the CEO's beliefs were at  
21 that time. And that's what we're asking about.  
22 THE COURT: But what he's talking about  
23 is authentication, I believe.  
24 MR. WILNER: Well, I don't think he  
25 said -- Well, it's self-authenticating. He's got  
8003  
1 his picture and his signature. It comes from  
their  
2 records. And I can verify it comes from their  
3 records.  
4 THE COURT: How can you establish --  
5 MR. WILNER: I go back to that. And I  
6 think we've got the -- I've got the document that  
7 shows that it came from the site that they have  
put  
8 up specifically from the public. Furthermore,  
it's  
9 self-authenticating. I couldn't possibly create  
10 it. He's verified that that's his picture. This  
11 is his signature, which we can match with other  
12 signatures on their annual reports.  
13 I mean, it's a preposterous suggestion  
14 that this is not authentic. It's preposterous.  
15 MR. HARDY: I'm not contending that's  
not  
16 his signature. I'm not contending that's not his  
17 picture. I don't know whether it was prepared by  
18 Philip Morris or by an advertising agency. I  
don't  
19 know whether it ever went out. I don't know  
20 whether it's a draft or a final. I don't know the  
21 first thing about it.  
22 THE COURT: Okay. Now, I don't think  
23 he's required to establish all of that in order to  
24 make it admissible evidence. So long as it is an  
25 authentic representation of something that the  
8004  
1 president has produced, whether it's in-house, out  
2 of house --  
3 MR. HARDY: Well, Your Honor, my point  
is  
4 at this point I don't know whether this was  
5 something that -- whether this was a work in  
6 progress that was never finalized and never sent  
7 out or whether, in fact, it was.  
8 THE COURT: I don't think that makes it  
9 inadmissible, that we don't know what the degree  
of  
10 circulation of it was, unless he attempts to  
11 suggest without evidence as to what its  
12 dissemination was. It --  
13 MR. HARDY: But it has no relevance if  
it  
14 didn't go out to anybody.  
15 THE COURT: Certainly. It would be  
16 reflective of the person's thinking, even if it  
17 went -- even if he prepared it and put it into a  
18 file drawer, I would think. Again, I don't -- I  
19 mean, I'm assuming that that's -- that he's not at

20 this point attempting to suggest that this  
21 is -- that this was somehow disseminated. But  
22 rather that he's going to the content of it as  
23 reflected by the thinking of the president.  
24 Now, if he wants to suggest  
25 dissemination, then I think he's got to have some  
8005

1 evidentiary basis for it.

2 MR. WILNER: All right.

3 MR. HARDY: Could I also, because of the  
4 length of the document, ask to know what it is

that

5 Mr. Wilner intends to --

6 MR. WILNER: I have that written down up  
7 front there, as I -- and I communicated that  
8 earlier. I just don't -- I have that written on

my

9 notes. I have to go get my notes.

10 MR. HARDY: I just need to know what it  
11 is he intends to offer.

12 THE COURT: Why don't you take a minute  
13 back there and show him what it is you intend to  
14 use.

15 (Whereupon, the bench conference is  
16 concluded.)

17 MR. HARDY: Your Honor, there are about  
18 seven pages here. And I don't know whether I have  
19 an objection here or not. But, in view of the  
20 time, could I have the noon recess to read this,

to

21 see whether I have an objection?

22 THE COURT: About how much more time do  
23 you have, Mr. Wilner, in your cross-examination?

24 MR. WILNER: I'm hoping for about an  
25 hour.

8006

1 THE COURT: All right. Let's go ahead  
2 then, Sheriff, and we shall recess until  
3 2:00 o'clock.

4 (Whereupon, the jurors were excused from  
5 the courtroom.)

6 (Whereupon, the lunch recess ensued at  
7 12:30 p.m.)

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

8007

1 COURT REPORTER'S CERTIFICATE

2 STATE OF TENNESSEE:  
3 COUNTY OF SHELBY:  
4 I, LORI-ANN MASON, RPR, do hereby certify:  
5 1. The foregoing transcript of proceedings  
6 was taken before me at the time and place stated  
in  
7 the foregoing styled cause with the appearances as  
8 noted;  
9 2. Being a Court Reporter, I then reported  
10 the transcript of proceedings in Stenotype to the  
11 best of my skill and ability, and the foregoing  
12 pages contain a full, true and correct transcript  
13 of my said Stenotype notes then and there taken;  
14 3. I am not in the employ of and am not  
15 related to any of the parties or their counsel,  
and  
16 I have no interest in the matter involved.  
17  
18  
19

Lori-Ann Mason, RPR  
Notary Public at Large  
State of Tennessee

21 My commission expires:  
22 August 29, 2001  
23  
24  
25

8008

1 INDEX OF PROCEEDINGS  
2

3 April 21, 1999  
4 (Morning Session)  
5  
6  
7

8 WITNESS: PAGE  
9 RICHARD ALLAN CARCHMAN, Ph.D.  
10  
11 CROSS-EXAMINATION (Cont'd.)  
12 BY MR. WILNER.....

7853

8009

1  
2 E X H I B I T S  
3  
4

5 EXHIBIT NUMBER PAGE  
6  
7 Exhibit Number 387 was marked for

7859       8     identification and admitted into evidence.....  
          9     Exhibit Number 388 was marked for  
7869       10    identification and admitted into evidence.....  
          11    Exhibit Number 389 was marked for  
7872       12    identification and admitted into evidence.....  
          13    Exhibit Number 390 was marked for  
7893       14    identification and admitted into evidence.....  
          15  
          16  
          17  
          18  
          19  
          20  
          21  
          22  
          23  
          24  
          25